115-616

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~332~~ 66

CLAY COUNTY, IOWA, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES EX REL. HUGH McALEER, SR., AND HUGH McALEER, JUNIOR, ADMINISTRATORS OF MICHAEL McALEER, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED OCTOBER 9, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas in the circuit court of the United States for the central division of the district of Iowa, at a term thereof, begunand holden at the United States court-house, in the city of Des Moines, in said district, before the Honorable George W. McCrary and Honorable James M. Love, judges, on the third Tuesday of May, it being the ninth day of May, A. D. 1882.

Attest: EDWARD RILLASON, *Clerk.*

2 Be it remembered, that heretofore, to wit, on the 2d day of May, A. D. 1881, The United States, on the relation of Hugh McAleer *et al.*, administrators, &c., of estate of Michael McAleer, deceased, by Brown & Dudley, their attorneys, filed in the clerk's office of the circuit court of the United States for the central division of the district of Iowa an information for mandamus against Clay county, Iowa, which said information is in the words and figures following, to wit:

3 *Information for Mandamus.*

In the Circuit Court of the United States for the District of Iowa, Central Division.

THE UNITED STATES, on the relation of Hugh McAleer & Hugh McAleer, Jr., Administrators of Michael McAleer, deceased,

vs.

CLAY COUNTY, IOWA.

To the judges of said court:

The petition of Hugh McAleer and Hugh McAleer, Jr., administrators of the estate Michael McAleer, deceased, states that they are the administrators duly appointed and qualified of the estate of said deceased, and were so appointed by the proper surrogate courts of the county and State of New York, on or about the —— day of ——, A. D. 1881.

4 That on the 21st day of Oct. 1864, the said circuit court of the United States duly rendered a judgment in favor of the said Michael McAleer and against the said County of Clay, in the State of Iowa, in the sum of nine thousand one hundred & seventy two & $\frac{50}{100}$ dollars, bearing interest at the rate of six per cent. and costs, taxed at $\$27\frac{81}{100}$ dollars.

That at the commencement of the action in which said judgment was rendered, and at all times since & until the time of his death, the said Michael McAleer was a resident and citizen of the State and county of New York.

That he departed this life on the 22 day of February, 1881, at his residence in said State, intestate; and, at the time of his death, was the owner of the judgment aforesaid, and the same is entirely unpaid, save the following payments and credits:

5	Oct. 17, 1865	$3,000 00
	Dec. 25, 1865	216 72
Jan'y 6, 1866		$200 00
M'ch 17, 1866		600 00

Jan'y 7, 1867	$467 77
M'ch 21, 1867	589 53
May 25, 1867	278 17
June 29, 1867	500 00
Jan'y 6, 1868	183 84
Jan'y 9, 1868	67 00
Nov. 14, 1868	270 39
April 26, 1868	200 00

& have never been vacated, modified, or released.

That the said county of Clay is a municipal corporation of the State of Iowa, duly created by & existing under and by virtue of the laws of Iowa.

That execution has been issued upon said judgment and returned "no property found," & the execution unsatisfied; that the said county of Clay has no property out of which said judgment can be made; that by the laws of Iowa the public and private prop-
6 erty of such corporation is exempt from execution; that the busines of said corporation is conducted and managed by a county auditor, & J. J. Devoe, James Goodwinne, H. Smith, R. Somers, & John Dodge, who compose the board of supervisors and manage its financial affairs, cause its taxes to be levied and collected, and whose duty it is to provide for the payment of judgments rendered against it.

That it is the duty of the said defendant, by the rendition of said judgment and by virtue of the laws of Iowa, to levy, collect, and pay over to relators a tax upon the property in said county of Clay sufficient to pay said judgment, interest, & costs promptly and fully.

That, notwithstanding its duty so to do, and though requests by relators before the filing of *of* this information to make such
7 levy, collection, & payment, the said defendant has wholly failed and refused so to do & perform said duty.

That your relators will sustain damage by such failure and refusal and non-performance of said duty.

Wherefore, and inasmuch as the relators are without any plain, speedy, & adequate remedy in the ordinary course of the law, they pray that a writ of mandamus be issued out of this court in due form, commanding the said defendants to perform said duty and to levy, collect, and pay over to your relators a tax sufficient to pay the aforesaid judgment, interest, and costs, and the costs of this proceeding; and they will ever pray.

(Signed) BROWN & DUDLEY,
Att'ys for Hugh McAleer & Hugh McAleer, J.,
Administrators & Relators.

8 UNITED STATES OF AMERICA, }
District of Iowa, Central Division, } *ss:*

I, L. J. Brown, being duly sworn, do say that I am one of the attorneys of the relators, and know the facts stated in the foregoing information, from papers and documents in my possession as att'y, and the statements therein contained are true, as I verily believe.

(Signed) L. J. BROWN.

Subscribed and sworn to before me, and in my presence, by L. J. Brown, this 2- day of May, 1881.

[SEAL.] (Signed) REES H. PARRY,
Notary Public, Polk Co., Iowa.

N. P., 50ct.

(Endorsed:) U. S. *ex rel.* Hugh McAleer, Hugh McAleer, Jr., adm'r, *vs.* Clay Co., Iowa. Information for mandamus. Filed May 2, 1881. E. R. Mason, clerk. N. P. fees, 50 ct. B. & D. for McAleer.

9 And on the 31st day of October, 1881, in the record of the proceedings of said court is an entry in said cause, in the words and figures following, to wit:

10 United States Circuit Court, District of Iowa, October Term, 1881.

MONDAY MORNING, *October* 31, 1881.

HUGH MCALEER *et al., ex rel.*,
vs.
CLAY COUNTY, IOWA. } No. 2892. Law.

This cause came on this day for hearing on plaintiff's demurrer to the defendant's return to the alternative writ of mandamus herein. Plaintiff's appeared by Brown and Dudley, and defendant by Wright & Wright; and the court being fully advised in the premises, it is ordered, that said demurrer be, and the same is hereby, sustained, with leave to plaintiffs to amend the prayer of the alternative writ in ten days from this date, defendants to file amendment to return to said writ in twenty days thereafter.

11 And on the 30th day of November 1881, the relators, Hugh McAleer *et al.*, administrators, &c., by Brown & Dudley, their attorneys, filed in said cause an amendment to the information for mandamus, which said amendment is in the words and figures following to wit:

12 In the Circuit Court of the United States, for the Central Division, Dist. of Iowa.

UNITED STATES *ex. rel.* Hugh McAleer, Sr., & Hugh McAleer, Jr., Administrators of Michael McAleer,
vs.
CLAY COUNTY, IOWA.

Now comes the relators, and with leave first had and obtained as an amendment to their information and petition for mandamus: State that they ask in addition to the relief asked in their original petition and information, that the said defendants be commanded to set apart of the funds in their hands, and of the revenues collected and to be collected for and during the year 1881, and to pay
13 over the same in and amount sufficient to satisfy said judgment, interests, and costs, and if the amount shall not be suf-

ficient, that then said defendant be compelled to levy for the year 1882 an amount sufficient to pay the said judgment, or any balance remaining, and interest and costs, and for such other relief as may be proper in the premises.

(Signed) BROWN & DUDLEY,
Att'ys for Relators.

(Endorsed:) U. S. *ex rel.* Hugh McAleer *et al. vs.* Clay County, Iowa. Amendment to prayer. Filed Nov. 30, 1881. E. R. Mason, clerk. B. & D., att'ys.

14 And on the 7th day of April, 1882, the defendant, by Wright, Cummins and Wright, and E. E. Snow, its attorneys, filed in said cause an amended and further answer to relator's information, which said amended answer is in the words and figures following, to wit:

15 *Amended Answer.*

In the Circuit Court of the United States in and for the District of Iowa.

The UNITED STATES on the relation of Hugh McAlear and others, Plaintiff,
against
CLAY COUNTY, IOWA, Defendants.

Comes now the above-named respondent, and for further answer to the alternative writ of mandamus issued herein, and by leave of court first had and obtained, says:

That the assessed valuation of all the taxable property in said county for the year 1880 was nine hundred and ninety thousand six hundred and forty-four dollars ($990,644.00).

That on, to wit, the 7th day of September, 1880, the board
16 of supervisors of said county, in pursuance of law, levied a tax for ordinary county revenue upon said valuation of six mills on the dollar.

That the current expenses of said Clay county for the year 1880, amounted to the sum of ten thousand two hundred and sixty-three dollars and forty-eight cents ($10,263.48).

That of said sum $3,410.08 was paid for the salaries of county officers.

That $881.01 thereof was paid for court expenses.

That $5,972.39 thereof was paid to township officers for the establishment of highways, for taking care of the poor, for fuel, and for other incidental expenses necessary and proper for the maintenance of the county government.

The respondent further says that the assessed valuation of the taxable property within said county for the year 1881 is one
17 million three hundred and eighty-five thousand four hundred and thirty-three dollars ($1,385,433.00).

That on or about the — day of September, 1881, the board of supervisors of said Clay county, as by law provided, levied a tax on

said valuation of six mills on the dollar for ordinary county revenue.

That the current expenses of said Clay county for and during the year 1881 amounted to the sum of fifteen thousand five hundred and sixty-five dollars and forty-five cents ($15,565.45).

That of said last-mentioned sum $3,024.12 was paid for the salaries of county officers.

That $1,885.17 thereof was paid for court expenses.

That $260.00 was paid on a purchase of land for a county poor farm.

That $1,185.00 thereof was paid for the erection of a county poor house.

18 That $9,211.10, being the remainder thereof, was paid per diem for township officers, for the establishment of highways, for taking care of the poor, for fuel, and for other incidental expenses necessary and proper for the maintenance of the county government.

Respondent further shows that the amount so levied for ordinary county revenue was, during each year, to wit, 1880 and 1881, less than the amount required for the proper maintenance of said county government.

That no part thereof could have been devoted to the purpose of paying the judgment mentioned in said petition, without seriously impairing the efficiency of said government.

That the maximum levy for said purpose for the year 1882
19 will not be sufficient to pay the ordinary current expenses of said county, and that no part thereof can be applied for the payment of said judgment without seriously impairing the efficiency of said county government.

Wherefore respondent prays to be discharged wits its costs.

(Signed) WRIGHT, CUMMINS & WRIGHT &
" E. E. SNOW,
Attorneys for Respondent.

The consent to the filing of this amendment.

(Signed) BROWN & DUDLEY,
Pr. CUMMINS.

(Endorsed:) United States cir. court, dist. of Iowa. McAleer *vs.* Clay County. Amendment to answer. Filed April 7, 1882. E. R. Mason, clerk. Wright, Cummins & Wright & E. E. Snow, for resp.

20 And on the 10th day of May, 1882, the relators, by their attorneys, filed in said cause their demurrer to the amended answer of defendants, which said demurrer is in the words and figures following, to wit:

21 In U. S. Circuit Court, District of Iowa.

HUGH MCALEER, SR., HUGH MCALEER, JR., Executors,

vs.

CLAY COUNTY, IOWA.

Now comes your relators and demur to the 1st division of the answer and return of the defendants herein, and say that the same is insufficient in this, that it shows that the defendants are resisting the collection of the judgment and refusing to perform the matters demanded, and that an execution has been returned *nulla bona.*

Relators demur to the 2d division of the answer of defendants, and say the same is insufficient in this, that the denial of credits is not sufficient on information & belief in this case.

22 Relators demur to the 3d division of the answer of defendants on the ground that the same is insufficient in this, among other things, that it confesses that this judgment is a demand and unsatisfied, and a valid indebtedness, and was upon ordinary warrants for the expenses of the county, and that the same is entitled to preference by reason of the judgment and its priority.

That the levy for 1882 has not yet been made, and that a levy can be made within the limits of six mills sufficient to pay the judgment in full.

That the revenues of the county are not dependent upon the six mills alone, but that the county is raising money by funding to pay the expenses of the county in constructing highways & bridges, and other matters of permanent improvement.

23 That this judgment is one of long standing, and unless the county is compelled to pay will be defeated and expire by limitation.

They demur to the 3d division of this answer on the ground that there is no such limitation in law, and no facts stated which constitute a defense or reason why the writ should not issue.

And they demur to the entire answer as amended for the reasons above stated, and there are no facts stated which excuse the refusal or defeat the relief demanded, and the same constitute no defense or answer to the information.

(Signed) BROWN & DUDLEY,
For Relators.

(Endorsed:) No. —. U. S. C. Ct., dist. Iowa. McAleer *vs.* Clay County, Iowa. Demur to ans. Filed May 10, 1882. E. R. Mason, clerk. B. & D. for rel.

24 And on the 15th day of May, 1882, in the record of the proceedings of said court, is a judgment entry in said cause, which said entry is in the words and figures following, to wit:

25 United States Circuit Court, District of Iowa. May Term, 1882.

MONDAY MORNING, *May* 15, 1882.

HUGH MCALEER, Sr., and HUGH MCALEER, Jr., Executors of MICHAEL MCALEER *ex rel.*

vs.

BOARD OF SUPERVISORS OF CLAY COUNTY, IOWA.

Now, on this 15th day of May, 1882, this cause coming on for hearing on the demurrer of relators to the amended answer to the return of defendant to the alternative writ of mandamus herein, and the parties appearing by their attorneys, relator by Brown and Dudley, and respondents by Wright, Cummins and Wright. And court having heard the arguments of counsel, upon consider-
26 ation sustains said demurrer; to which defendant excepted, and thereupon the defendants, electing to stand on its answer, the court orders that the pre-emptory writ of mandamus issue commanding the board of supervisors of said Clay county, Iowa, forthwith to levy a tax of one mill on the dollar of the assessed valuation of the property of said Clay county, Iowa, for 1882, and to be collected with the taxes of the current year 1882, and to pay the same upon the judgment of relator, and that they levy and collect and pay over a tax of one million the dollar each year until relator's judgment, interest, and costs are fully paid; to all of which defendants at the time excepted.

27 And on the 14th day of July, 1882, a writ of error was filed in said cause, which said writ of error is in the words and figures following, to wit:

28 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of Iowa:

Because that in the records and process, and also in the rendering of judgment in a suit before you between Clay Co., Iowa, plaintiff in error, and United States *ex rel.* Hugh McAleer *et al.*, adm'r of McAleer, deceased, of defendant, a manifest error has intervened, to the great damage of the said pl'ff in error, as in his complaint stated, and as it is just and proper that the error, if any there be, *be* should be corrected in due form, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under
29 your seal, you do distinctly and openly send the record and process in this suit aforesaid, with all things concerning them and this writ, so that you have the same before the Chief Justice and the Associate Justices of the Supreme Court of the United States, on the second Monday of October next, at Washington, being the present seat of the National Government: that the record and process aforesaid being inspected they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, at Washington aforesaid, this 13th day of July, 1882, being the 107th year of the Independence of the United States.

[SEAL.] (Signed) EDWARD R. MASON,
Clerk U. S. Circuit Court, Cent. Div., Dist. Iowa.

30 (Endorsed:) U. S. C. C. United States *ex rel.* Hugh McAleer *vs.* Clay County, Iowa. Writ of Error. Filed July 14, 1882. E. R. Mason, clerk.

31 And on the same day, to wit, July 14th, 1882, a bond on writ of error was filed in said cause, which said bond is in the words and figures following, to wit:

32 *Supersedeas Bond.*

Supreme Court of the United States.

UNITED STATES *ex rel.* HUGH MCALEER *et al.* Adm'r of MCALEER, Deceased.

vs.

CLAY COUNTY, IOWA.

Know all men by these presents that we, Clay County, Iowa, as principal, & T. P. Bender, A. W. Miller, Chas. McAllister, & P. E. Randall as sureties, are held & firmly bound unto the above-named Hugh McAleer, administrator, his assigns & successors in office, in the penal sum of fifteen thousand dollars, lawful money of the United States, to be paid to the said Hugh McAleer, his assigns or successors in office; to which payment, well & truly to be made, we bind ourselves & each of us, jointly & severally, and one &
33 each of our heirs, executors, & administrators, firmly by these presents.

Sealed with our seals & dated this 13 day of Jun-, 1882.

Yet upon these conditions: Whereas the above-named Clay County has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States in & for the district of Iowa:

Now, therefore, if the above-named Clay County shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

CLAY COUNTY, [SEAL.]
(Signed) By WRIGHT, CUMMINS & WRIGHT,
Its Att'ys.

T. P. BENDER. [SEAL.]
A. W. MILLER. [SEAL.]
CHAS. MCALLISTER.
P. E. RANDALL.

Approved June 13, 1882.
(Signed) GEO. McCRARY,
Circuit Judge.

34 (Endorsed:) United States *ex rel.* Hugh McAleer, adm'r, *vs.* Clay County, Iowa. Bond on writ of error. Filed July 14, 1882. E. R. Mason, clerk.

35 And on the 14th day of July, 1882, a citation was filed in said cause, the original of which is hereunto attached, to wit:

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States to United States *ex rel.* Hugh McAleer *et al.*, adm'r of Michael McAleer, deceased:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the district of Iowa, wherein Clay County, Iowa, is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Geo. W. McCrary, judge of said court, this 13th day of June, 1882.

GEO. W. McCRARY, *Judge.*

Service accepted, this 14 day of July, 1882.
BROWN & DUDLEY,
Att'ys for Hugh McAleer, Sr., & Hugh McAleer, Jr., Adm'rs of Michael McAleer.

[Endorsed:] U. S. *ex rel.* Hugh McAleer *vs.* Clay County, Ia. Citation. Filed July 14, 1882. E. R. Mason, clerk.

37 United States Circuit Court, Central Division of the Southern District of Iowa.

I, Edward R. Mason, clerk of said court, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of the information, record entry of October 31, 1882, amendment to information, amended answer, demurrer to amended answer, judgment entry, writ of error, bond on writ of error, and citation in a certain cause in said court, wherein United States *ex rel.* Hugh McAleer *et al.*, administrators, &c., are plaintiffs, and Clay County, Iowa, is defendant, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original citation, with the acceptance of service thereon, is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix

the seal of said court, at Des Moines, in said district, this 18th day of September, A. D. 1883.

[SEAL.] EDWARD R. MASON,
Clerk U. S. C. C., Cent. Div., S. Dist., Ioa.

Endorsed on cover: Iowa C. C. U. S. No. 332. Clay County, Iowa, *vs.* plaintiff in error, The United States *ex rel.* Hugh McAleer, Sr., and Hugh McAleer, Junior, administrator of Michael McAleer, deceased. Filed 9th October, 1883.

115-616

RECEIVED
OCT 10 1885
JAMES H. McKENNEY
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 332.

CLAY COUNTY, IOWA, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES EX REL. HUGH McALEER, SR., AND HUGH McALEER, JR., ADMINISTRATORS OF MICHAEL McALEER, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

Brief of Plaintiff in Error by George G. Wright.

P. C. KENYON, LAW BRIEF PUBLISHER.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

CLAY COUNTY, IOWA, *Plaintiff in Error,* *vs.* THE UNITED STATES, EX REL., McALEER'S ADMINISTRATORS, ETC.	*In Error to the Circuit Court of the United States for the District of Iowa.* No. 332.

STATEMENT.

MANDAMUS:—Michael McAleer, in October, 1864, recovered judgment against the plaintiff in error in the sum of about $9,200, of which there remained unpaid at the time of the commencement of this proceeding, say $4,800; payments having been made for each of the years 1865–'6–'7 and '8, in the aggregate of $6,573.42 (Fol. 5).

This petition was filed in May, 1881, showing the judgment, execution and return of *nulla bona* and stating the duty of the county, through its proper board, to levy, collect and pay over to relators (who are the administrators of Michael McAleer), a tax upon the property of the county sufficient to pay said judgment, interest and costs—that the supervisors of said county, though requested, have failed and refused to do this—whereupon the prayer is for a *mandamus* commanding the defendant to perform said duty and to levy, collect and pay over a tax sufficient, etc. This prayer was afterwards amended so as to ask, in addition, that defendant be commanded to set apart of the funds in its hands of the revenue to be collected for the year

1881, an amount, etc., and if this is not sufficient that it be compelled to levy for the year 1882 an amount, etc. (Fol. 6, 7 and 13.)

To this petition there was an answer in substance that for the year 1880 the assessed valuation of the property in said county was $990,644, that the tax levied was six mills on the dollar, and the county expenses $10,263.48; that for 1881, the assessed valuation was $1,385,433, that a tax of six mills was levied thereon and the current expenses were $15,565.45; that the amount so levied each of these years was less than that required for the proper maintenance of the county government; that the maximum levy for 1882 will not be sufficient to pay the ordinary expenses of the county and that no part thereof can be applied to the payment of this judgment without seriously impairing the efficiency of said county government, wherefore, etc. (Fol. 16 and 19.)

To this answer there was a demurrer for reasons sufficiently appearing in the brief and argument and hence not here repeated (Fol. 21–23).

This demurrer (May 15, 1882,) was sustained and defendant (the county), standing on its answer, the peremptory writ was ordered, commanding the supervisors forthwith to levy a tax of one mill on the dollar of the assessed valuation of the property for the year 1882, to be collected with the tax of that year, and a like tax for each succeeding year until said judgment, etc., should be fully paid. Defendant excepted and prosecutes this writ.

ASSIGNMENT OF ERRORS.

The county of Clay, plaintiff in error, says:

1. Its answer presented good and sufficient cause against the relief asked.

2. The county had no power, and under the laws of Iowa, it could not levy more than six mills on the dollar of the assessed valuation, for ordinary county revenue.

3. The law limiting the amount of such levy, it was not competent for the court to command a greater levy.

4. Since the amount levied for prior years, and to be levied (for the year 1882) was as much as was allowed by law, and since this levy in its every dollar, according to the answer, was required to defray the necessary current expenses of the county, and to divert any portion of it to the payment of this judgment would seriously impair the efficiency of the county government, it follows that it was error to order such appropriation or diversion.

5. In the absence of any showing of bad faith on the part of the county officials in the assessment of property, and the levy and expenditure of the revenues, petitioners had no right to demand that any portion of the funds collected for ordinary county purposes should be appropriated to the payment of this judgment.

6. The ordinary and honest current expenses of a county must be first met, and so long as the revenues collected amounting to the maximum allowed by law, are necessary for these purposes, no judgment creditor can by *mandamus* compel an appropriation of any part of said sums to the payment of his debt.

7. There was no power to levy more than six mills on the dollar, and the court erred in commanding the increased or additional levy. The court could not command that to be done which the law did not permit.

8. The court erred in sustaining the demurrer to the answer and in awarding the peremptory writ of *mandamus*, and especially in commanding the levy of one mill on the dollar of the assessed valuation for the year 1882: and a like levy, collection and payment for succeeding years, until said judgment should be paid.

9. It was in the discretion of the board to make or decline to make this levy; these taxes were exempt from this process and neither this discretion could be controlled nor the taxes set apart by the court.

10. There was error in view of the facts shown by the answer in ordering the peremptory writ and all to the prejudice of plaintiff in error.

BRIEF—POINTS IN ARGUMENT.

I.

By statutes, in Iowa, it is declared—

That the board of supervisors of each county shall annually, at their September session, levy the following taxes upon the assessed value of all the taxable property in the county. * * *

2. For ordinary county revenue, including the support of the poor, not more than four mills on the dollar and a poll tax of fifty cents.

Amended so as to strike out *four* and insert *six*—with this addition:

Provided, that the provisions hereof shall not apply to counties having a population exceeding 14,000 inhabitants, except to counties having an area exceeding nine hundred square miles, and to such counties the provisions hereof shall apply.

Rev. 1860, Sec. 710.
Code 1873, Sec. 796.
Laws of 15th G. A., ch. 28; 18th *ib.*, ch. 13.

So, that in any event it will be seen, whatever the population or area of this county, the maximum amount of the levy is *six* mills, and this is more than was allowed when plaintiff's debt was contracted and his judgment recovered. So he cannot complain that the statutory levy has been *reduced* since he contracted with the county or took his warrants leading to his judgment.

It is also provided as follows—

If no property of a municipal corporation, against which execution has issued, can be found, or if a judgment creditor elect not to issue an execution against such corporation, a tax must be levied as early as practicable to pay off the judgment. When a tax has been so levied and any part thereof has been collected, the treasurer of such corporation shall pay the

same to the judgment creditor, or to the clerk of the courts in which the judgment was rendered in satisfaction thereof.

Code 1882, Sec. 3049.
Rev. 1860, Sec. 3275.
13th G. A., ch. 43; 14th G. A., ch. 87.

Neither of these statutes, nor any other in Iowa authorize the levy of a tax in excess of the limit, to-wit, six mills, as shown above.

Iowa Land Co. vs. Sac Co., 39 Iowa, 124.
Oswald vs. Thedinga 17 *ib.*, 13.
Jeffries vs. Larimer, 42 *ib.*, 498.
Clark vs. City of Davenport, 14 *ib.*, 494.

Followed and approved:

Sterling Co. vs. Harvey, 45 *ib.*, 466.

And see—

Polk & Hubbell vs. Winnett, 37 *ib.*, 34.
Porter vs. Thompson, 22 *ib.*, 391.
Coffin vs. City Council, 26 *ib.*, 515.

It is clear therefore that if the tax ordered in this case was in addition to the six mills allowed by law, it was in excess of the limit permitted and could not legally be either asked or allowed.

2 Kent, 299, 12 Iowa, 545.
Bank vs. Earl, 13 Pet., 585.
Minturn vs. Lawrence, 23 Howard, 435.

II.

But it is said there was no excess ordered, and that the command was to levy one mill specifically to pay this judgment, whatever other levy might be made, whether six or less than six. Of course, however, this being done the levy for the current revenues of the county, to meet its actual necessary expenses would have to be reduced at least this one mill, or the entire levy would be more than six. Now if, as the answer

shows, a levy of the maximum six mills was necessary to meet these expenses, and the appropriation of this one mill, or one-sixth of the revenue, to the payment of this judgment would seriously impair the efficiency of the county government, was this county bound to make the levy; was it a duty imposed by law; and could any court legally order it if the county officers in the exercise of their discretion failed to comply with the request?

This presents a question of the greatest practical importance to every county in Iowa, and other states as well; and one, that so far as I know is without decision in this court, though we submit not quite so in Iowa.

The county is an integral part of the state; has its local government; its machinery—highways must be established; its officers must be paid; its poor provided for; its courts must run; that thus the people may be protected in their rights of property, liberty and life. These things, and many others, which might readily be suggested, cannot be secured nor provided for without money; nor can they be postponed, since expenditures for these purposes are necessities every day. If the ordinary county revenues, to the extent of one mill, can be *diverted*, so as to impair the efficiency of the county government, then it can one-half or all, and the government must come to an end. If it can be done in one county it can in all: and if in a county, so in a state; and all efficient, needed and proper government must or can only exist in name. Is it said that if the county contracted a debt in order to have efficient government, in the past, it should in law be compelled to pay that debt, even if it contracts another? The answer is that it may not be able to contract a new, though it did the old debt; that though it once obtained credit to avoid starvation, it may not now be able to find like kind hearts to give it bread without payment. Then, too, when this creditor extended credit, he knew, as did all others, what the law was; he knew the limit of taxation, and that the county must live—must have a

revenue to meet its expenses. He therefore took his chances that either by the growth of the county in its property, or decrease in expenses, or both, his debt would be paid by the usual methods. If the maximum was not levied, he might ask that it should be increased, but it was no part of the contract, either in law, morals or reason, that if the county officers were acting in good faith the efficiency of the county agencies should be impaired for years by a special levy to meet his demand. The duty of the county to pay its debts may be ever so high, but even higher is that of keeping up its machinery, and give to the people for each day, month and year good and efficient government. It is a duty not to be avoided, and the rule established in this case by the court below, is a blow direct and most fatal to all government. The one for which we contend is vital to the very life and existence of the county, and even the state.

Suppose the warrants leading to this judgment had been drawn on the school fund provided for by the third clause of said section 796. That allows the levy of not less than one nor more than three mills for the support of schools. The judgment creditor demands a levy of one or two mills for the payment of his debt, and this being taken from the amount permitted (three mills, let us suppose, being absolutely necessary), empties the school houses and stops all schools. That cannot be the law. It is not reasonable; not in accord with the theory of our taxing system—with the powers of these municipalities—with the object, purpose, aim and mission of these smaller governments.

The creditor in all these cases must take his chances; and, we repeat, that he has no legal right to demand that courts and schools shall be closed, county officers deprived their salaries, all necessary county work and improvements cease, in order to gratify his prayer that his debt shall be paid to the possible exclusion of others and the certain interference with the efficient and proper management of all the affairs and business of the county.

[A, in Iowa, owes $500; lives in a homestead exempt from execution, which he ought, perhaps, to sell, in whole or in part, to pay his debt, but neither any creditor nor any court in the land can compel him to do this. So, the county ought, perhaps, be made to pay its debts, but if it cannot without breaking up the county homestead and county housekeeping, there is no power, so long as it acts honest, to compel it. We have to do here with the law, not a question of imaginary moral duty].

The judgment of the relators grew out of the "ordinary county warrants for the expenses of the county" (Fol. 22). These are always to be paid, and can only be paid in the manner provided by the legislation of the state. Such judgment may form the basis of an application for this writ; but the writ cannot, whether issued by federal or state court, command the proper officers to discharge other than the legal duties they owe under the statute. Federal courts cannot interfere with the policy of the state in respect to these rights, duties or remedies.

2 Dillon, Municipal Corp., Sec. 863.

Supervisors vs. United States, 18 Wall., 71.

[This case really overrules *Butz vs. Muscatine*, 8 Wall., 575, or at least so distinguishes that from the one then and now at bar as to leave the law clearly with us.]

And see what the author says in 2 Dillon (note 3) *supra*, Sec. 863.

The case in 18th Wall. is, in fact, in principle, express decision, and the whole argument conclusive of this.

Nor is there anything in *Louisiana vs. U. S.*, 103 U. S., 289, in the least in conflict but rather in support of our view.

For nature of county warrants, rights of holders, and remedies thereunder, see also—

Clark vs. Des Moines, 19 Iowa, 199.

Mayor of Nashville vs. Ray, 19 Wall., 468.

U. S. vs. Miller, 4 Dillon, 233.

State vs. Guttenburg, 38 N. J. L., 419.

Browne vs. Gates, 15 W. V., 131.

And directly in point—

Coffin vs. Davenport, 26 Iowa, 515.

[*U. S. vs. Clark*, 96 U. S., 211, adheres in express words to the Supervisor's case, 18 Wall., and the dissenting opinion of the chief-justice, concurred in by MILLER and BRADLEY, J.J., is even more pointedly in our favor.]

Then, too, that there is no power in the courts by mandamus to compel a county to levy a tax which the law does not authorize, and that a creditor is bound to know when he takes the obligations of these municipalities not only whether they had power to issue them, but of their powers by taxation to raise money to pay the same; see—

U. S. vs. Mason, 99 U. S. 582.

That case also holds that the judgment on the warrants gives the creditor no new rights in respect to the means of payment; certainly not by taxation not provided for by law. See, too—

State vs. Shortridge, 56 Mo., 126.

M. E. Church *in re.*, 66 N. Y., 395.

[And here it is proper to remark that the date of these warrants is not shown. There can be no claim, therefore, that the relator took them upon the faith of any decision of the state courts or this tribunal, if any were ever made, which we deny, that he would be entitled to this remedy, or the levy and collection claimed. The presumption is that the supervisors were in the line of duty in refusing this levy and appropriation, and this court will not and cannot assume a state of facts to bring them into contempt for not making the levy. Wrong on their part under the levy must be made to appear affirmatively.]

III.

And these views are strongly supported, if indeed, they are not made conclusive, by reference to our Code:

3048. Public buildings owned by the state, or any county, city, school district, or other municipal corporation, or any other public property, *which is necessary and proper for carrying out the general purpose for which such corporation is organized*, are exempt from execution.

Since this was the law in 1851 (section 1895), and continued by the Revision of 1860 (section 3274) and hence continuously for more than thirty years, it will be seen that relators knew from the law that they could not resort for the payment of their debt to any "property which is necessary and proper for carrying out the general purposes for which such corporation (county) is organized."

We submit that taxes necessary and proper for carrying on the government are "property," and as such, cannot be reached by this method by the creditor. They could not have been attached in the hands of a taxpayer, or the treasurer after collection; nor by analogy can they be reached in this way.

IV.

This is a *mandamus* proceeding. Grant that the board of supervisors might, in their discretion, have devoted a portion of the ordinary revenue each year to the payment of this judgment, or that they might, in the exercise of like discretion, have ordered a specific part of the six mills to be collected, set apart, and paid to the relators; we say grant this, does it follow that they can be compelled by this writ to do that which we insist rested and rests alone in discretion?

The Iowa statute is:

The action of mandamus is one brought in a court of competent jurisdiction, to obtain an order of such court, commanding an inferior tribunal, board, corporation or person, to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but cannot control such discretion (Code, section 3373).

Now, this is not a case where the money had been collected under a special tax which the treasurer neglected and refused to pay over, as in *Brown vs. Crego*, 32 Iowa, 498. Nor is it one where the county refuses to levy the maximum allowed by law. But one where the maximum has been levied, and where, when levied, either this creditor or some other must go unpaid for awhile, or the affairs of the county suffer. In such a case we submit that it is in the discretion of the board—no bad faith being charged—to devote the revenues to the necessities of the county and public service, and no court can control it.

Polk vs. Winnett, 37 Iowa, 34.
State vs. Morris, 43 *ib.*, 192.
Clark vs. Board of Directors, 24 *ib.*, 266.

There is no law which enjoins the payment of this claim to the exclusion of others, nor does the duty to levy the tax, as claimed, result from any office, and since the board may, looking at all the revenues and wants of the county, as well as its ability to raise money, appropriate the collection at its discretion, it follows that this writ was improperly granted. And this is true, by all authorities, though this discretion was exercised ever so unwisely.

24 Iowa, 266, *supra*.

V.

When the warrants leading to this judgment were issued the statute provided—

1. All orders for the allowance of money from the county treasury shall state on what account, and to whom the allowance is made, dating the same and numbering them consecutively through each year (Code, Sec. 308).

The county auditor shall * * * sign all orders issued by the board—for the payment of money (320).

When the warrant drawn by the auditor on the treasurer is presented for payment and not paid for want of money, the treasurer shall endorse thereon a note of that fact, the date of presentation, and sign it, and thenceforth it shall draw interest at the rate of six per cent (328).

County warrants shall be received at the treasury of the proper county for the ordinary county tax (854).

It will thus be seen that this creditor not only knew of the powers of the county in the matter of taxation and its maximum, but also his remedies if his warrants were not paid. He knew the fund drawn upon; that his warrants were receivable for the ordinary county tax; that he could thus use them, and that if not paid when presented to the treasurer, he was entitled to demand and must be paid a fixed rate of interest. And in this connection it may not be improper to suggest that if, by his petition, he should show such presentation and non-payment—that his warrant was anterior in presentation for payment to others which the treasurer persisted in paying, especially if the latter were not connected with the current business of the county—we say it might be that in such a case the treasurer could be restrained and compelled to pay those of older date and presentation. That would not be this case, however. We mention it simply to show that the relator is certainly not without remedy through the courts. And since he knew all the facts and the law when taking the warrants, he cannot well complain so long as this remedy is open to him.

He knew from the provisions cited that non-payment was possible if not probable. He took them as paper then due and payable—for these warrants, on their face, are all due amd payable, not on time, but at once on date of issue. He had no reason to expect payment at once, and knew if not paid he would get his interest. Now, can a speculator in these securities, by purchasing, it may be, $10,000 or more of this form of indebtedness, knowing that they will not be paid, and that the county must live, must pay its officers, must have highways, must have offices and fuel, proceed at once to recover his judgment, and by mandamus stop everything until he is paid? We say stop everything—for if the county can be crippled in its agencies and necessary work one-sixth, so it may be one-half, or all. What we deny, is the power to interfere at all, or of the court to impair in the least the efficiency of the county govern-

ment by or through this process in a case like this (for we repeat, something must be left to the discretion of the county board), and hence say, there was no more power to divert one-sixth of the revenue than there was to divert it all to the payment of this judgment.

This creditor had no right to a special levy under a special statute, for his debt is not as though he held a bond issued under a statute which provides for a definite tax for its payment. Nor is it a case (as in *Croy vs. City of Lyons*, 17 Iowa, 1), where the maximum amount had not been levied; nor where, if levied, the county could run and still pay the judgment. Indeed, this case is afterwards recognized as being fully in accord with our views.

French vs. City of Burlington, 42 *ib.*, 618.

It is simply a plain case where, if this creditor is paid, the people must be denied and deprived of their local government, or its efficiency so impaired as to amount to the same thing, if the answer is true, and it must be so accepted: where your Honors are to determine whether the relator's equities and legal rights are so strong and persuasive that this county, for a season, at least, must possibly close all its offices, allow its poor to suffer, stop its courts—in a word, stop house-keeping. That question, in view of the law, the decisions, and the highest considerations of public policy, cannot be difficult of solution.

GEORGE G. WRIGHT,
For Plaintiff in Error.

115-616

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 332.

CLAY COUNTY, IOWA, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES EX REL. HUGH McALEER, SR., AND HUGH McALEER, JR., ADMINISTRATORS OF MICHAEL McALEER, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

P. C. KENYON, LAW BRIEF PUBLISHER.

Hon Mitchell
For Defts.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

CLAY COUNTY, IOWA, *Plaintiff in Error,* *vs.* THE UNITED STATES, EX REL., McALEER'S ADMINISTRATORS, ETC.	*In error to the Circuit Court of the United States for the District of Iowa.* No. 332.

BRIEF IN REPLY.

The first assignment of error being general in its character, will be discussed in connection with the other assignments of error.

The second and third assignments of errors present the question of the power of the county to levy a tax, in the excess of the amount allowed by the statute. We think this question does not arise upon the record in this case.

The court in its order awarding a peremptory writ of mandamus commanding the board of supervisors of Clay county to levy a tax of one mill on the dollar of the assessed value of the property of Clay county, Iowa, for 1882, and each year thereafter until relator's judgment, interest and costs are fully paid (folio 26), is not an order for the board of supervisors to levy an additional tax over and above the six mills provided by statute for raising revenue to defray the necessary current expenses of the county.

Under the order of the court, as we understand it, the board of supervisors would make a levy of six mills or less, as provided by the statute, one mill of which would be applied in liquidation of the judgment of the relator, and the balance for the ordinary county purposes, so far as necessary, as provided by law.

We understand the rule of law to be as claimed by counsel for plaintiff in error, that the court cannot order the board of supervisors to levy a tax in excess of the amount provided by statute, in a case like the one under consideration.

II.

As to the fourth, fifth and sixth arguments of error.

It appears by the record in this case (folio 5) that the plaintiff in error made payments upon the judgment of the relator in the years 1865, 1866, 1867 and 1868. All these payments were made during the time when the board of supervisors, by the law then in force, could only levy a four mill tax, the statute then providing as follows:

> 2. For ordinary county revenue, including the support of the poor, not more than four mills on the dollar and a poll tax of fifty cents.
>
> Rev. 1860, Sec. 710.

Since the change in the law empowering the board of supervisors to levy a tax of six mills on the dollar, the county has made no payments.

Code 1873, Sec. 796.

The record in this case further shows (folios 16 and 17) that the assessed valuation of all the taxable property in said county for the year 1880 was nine hundred and ninety thousand, six hundred and forty-four dollars ($990,644.00).

That for the year 1881 the assessed valuation of the taxable property of the county was one million, three hundred and eighty-five thousand, four hundred and thirty-three dollars

($1,385,433.00), showing an increase in one year in the valuation of the taxable property of three hundred and ninety-four thousand, seven hundred and eighty-nine dollars ($394,789.00).

Presumably the increase in the valuation of the taxable property will continue with the growth of the county.

It therefore seems a little strange that the county when permitted to levy only four mills on the dollar of the assessed value of the taxable property of the county could pay its cursent expenses, and at the same time pay a portion of the relator's judgment, and when the power of the county is enlarged so that it can, by its board of supervisors, levy a tax of six mills on the dollar upon a largely increased valuation, it absorbs all the revenue of the county thus raised, and when asked by the relator for payment of his judgment, makes no special showing, nor gives any good reason why the expenses of the county have increased over $5,000.00 in one year.

We think, from such facts the court might well reach the conclusion, if necessary, that the county was not managing its affairs in such good faith towards its creditors as the law demands.

If the county could pay its current expenses with a four mill tax—and there is nothing to show it could not—surely five mills ought to be enough to accomplish the same purpose upon an increased valuation.

The court will notice that the board of supervisors, in their return to the writ of *mandamus*, are able to give the amount paid for the salaries of officers, the amount paid for the court expenses, the amount paid for the purchase of land for county poor farm, the amount paid for the erection of a county poor house, but when they make return as to the balance, $9,211.10, we are told that amount was paid for the *per diem* of township officers, for the establishment of highways, for taking care of the poor, for fuel, *and for the incidental expenses necessary and proper for the maintenance of the county government.* (Folio 5.)

Now, it seems to us that "other incidental expenses" is

altogether too indefinite a statement, in a legal proceeding like the present one.

Beaulieu & Allen vs. City of Pleasant Hill, 4 McCrary, p. 554.

It is claimed by counsel for plaintiff in error that the court has no power to order an appropriation or division of the revenue of the county, as it did in this case, if the full levy raises only enough to pay the current expenses of the county.

Let us see how such a doctrine as this would work. A portion of the ordinary revenue of the county is used each year for the payment of salaries of the officers of the county.

Suppose, to illustrate, that the county had fallen behind in the payment of the salaries of its officers; or to make the illustration more pertinent, suppose the warrants upon which the judgment in the present case was recovered were warrants for the salary of a county officer, and that the relator was that officer, and the county was making the same defense as in this case, that all the revenue derived from the six mill tax would be used in paying the current expenses of the county, including the salaries of the present county officers.

Would not the officer, whose salary had not been paid, have good reason for wanting to know, why, if he could not be paid in full, he might not be paid at least a portion of what was justly due him? If the county could not pay in full, would it not be simple justice and fair dealing for the court to say to the board of supervisors: Here are two creditors of the county having equal claims for payment of their just debts; you cannot pay them in full, but you can pay a portion of their just claims and therefore in order to effectuate justice between them, the court will order an apportionment between you of the taxes assessed.

If the view of the law claimed by counsel for plaintiff in error shall prevail, then relator is powerless to enforce his judgment, and the board of supervisors can proceed from year to year absorbing all the revenue of the county.

Counsel for plaintiff in error suggests that if the county is compelled to pay its honest debts, it will seriously impair the efficiency of the county government.

We do not think the efficiency of the county government depends upon the fact of its spending the full amount of revenue, allowed to be raised by law, in paying the current expenses of the county and leaving nothing with which to pay its honest debts.

It seems to us rather that the efficiency of the county government would be better shown by economizing and by an honest effort to do something in the way of paying its creditors.

III.

The seventh assignment of error is the same as the second and third in legal effect, and presents the question of the power of the court to order a levy of a tax greater than allowed by the statute.

We make no contention with counsel upon that question.

IV.

As to the eighth assignment of error.

It was entirely competent for the court to make the order commanding a levy of one mill on the dollar of the assessed valuation for the year 1882, and succeeding years until said judgment should be paid.

The order of the court is that the board of supervisors levy a tax of one mill, which amount does not exceed the legal limit allowed by law, and to apply that amount in payment of relator's judgment.

Croy vs. City of Lyons, 17 Iowa, p. 7.

V.

As to the ninth assignment of error.

No discretion rests in the board of supervisors to make a levy of taxes up to the limit authorized by law, and when so ordered by the court to make such levy. When such levy is properly made in pursuance of such order of court, the creditor thereby acquires a right to so much of said tax as is necessary to pay his claim.

Croy vs. City of Lyons, 17 Iowa, p. 1.

VI.

The equities in this case are very strong and persuasive in favor of the relator.

The judgment in this case was recovered October 21, 1864. More than twenty years have elapsed, time enough surely for the county, by a judicious management of its affairs, to have paid this demand. What is a judgment worth if it cannot be collected?

It seems to us this is a plain case where a creditor has a just debt, and is only asking the small pittance of one mill of the tax raised, and that the payment of that amount cannot be freighted with any such dire results as the vivid imagination of counsel for plaintiff in error suggests.

Perhaps if the relator could get the small amount awarded him by the court, it might keep the wolf from his door.

John Mitchell
For Deft.